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In the Supreme Court of the United States

OCTOBER TERM, 1992

LUELLA BASSETT AND ELIZABETH LAFOREST,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether petitioners violated 18 U.S.C. 1382 when they entered an area within the boundaries of Wurtsmith Air Force Base that is part of a highway easement granted by the federal government to the State of Michigan.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 957 F.2d 1309.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1992. Petitions for rehearing were denied on May 1, 1992. The petition for a writ of certiorari was filed on July 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of unlawfully reentering a military base after the base commander ordered them not to do so, in violation of 18 U.S.C. 1382.[1] Petitioner Bassett was sentenced to 60 days' imprisonment and petitioner LaForest was sentenced to 21 days' imprisonment. Each petitioner was fined $1,000. The court of appeals affirmed. Pet. App. 1-18.

1. The evidence at trial showed that the federal government granted Iosco County, Michigan, a 150-foot-wide easement for the construction, maintenance, and use of a county highway along the edge of Wurtsmith Air Force Base. The easement extends 60 feet on each side of the highway. On the base side of the highway, the easement includes a grass strip located between the "white line" marking the edge of the highway and a permanent chain link fence. Pet. App. 3.

On August 4, 1990, the base commander had an orange snow fence, approximately three to four feet high, placed along the white line marking the edge of the highway. The fence ran for some distance along

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[1] That Section provides, in pertinent part:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such [place] after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
>
> Shall be fined not more than $500 or imprisoned not more than six months, or both.

the highway before running perpendicular to the highway across the grassy strip to join the permanent chain link fence. Pedestrian traffic was blocked on the grassy strip at the point where the snow fence intersected the permanent steel fence. Warning signs were mounted on the snow fence roughly every 20 feet, stating, "It is unlawful to enter this area without permission of the installation commander." Pet. App. 3-4.

Petitioners, together with a group of approximately 400 other protestors, marched down the grassy strip toward the base entrance until they encountered the snow fence. At that point, they pushed down the snow fence. Some of the protesters, including petitioners, entered the restricted portion of the base. Master Sergeant Brian Clever ordered the group to leave the base, reading the following statement:

> You are on a United States military reservation at Wurtsmith Air Force Base, Michigan.
>
> Specific permission of the installation commander is required for entry onto Wurtsmith Air Force Base and that permission has not been granted.
>
> The installation commander has determined that any political or protest demonstration taking place within the boundaries of Wurtsmith Air Force Base could interfere with the mission of the 379th Bombardment Wing.
>
> By order of the installation commander, Wurtsmith Air Force Base, you are hereby ordered to leave Wurtsmith Air Force Base.
>
> Your continued presence in Wurtsmith Air Force Base will place you in violation of the lawful order to leave and you will also be in violation of lawful

> regulations prohibiting your entry onto Wurtsmith Air Force Base.
>
> Your continued presence on Wurtsmith Air Force Base may render you criminally liable for violation of federal law.
>
> You are again ordered to depart Wurtsmith Air Force Base immediately.

Pet. App. 4-5.

When petitioners refused to leave after receiving that warning, they were arrested. The evidence at trial showed that petitioners had previously entered the base and had received letters from the base commander barring them from future entry. Pet. App. 5.

2. In finding petitioners guilty, the district court determined, among other things, that the Air Force had authority "to control all of the property to the edge of the roadway," and, under some circumstances, "even the entire roadway," if the base commander "should * * * choose in his judgment to do so." Pet. App. 22. The court observed that the base commander had exercised such control from time to time, and held that the base commander's decision not to exercise control at all times did not constitute an abandonment of the Air Force's authority over the area. The court also decided that "the area in question in this case had not been converted into any form of a public forum for the dissertation of political or religious or any other kind of protected speech." Pet. App. 24.

3. On appeal, petitioners argued that they were lawfully on the grassy strip at the time they were taken into custody because the federal government had granted Michigan an easement that included the land abutting the highway. In rejecting that con-

tention, the court of appeals relied on its previous decision in *United States* v. *McCoy*, 866 F.2d 826 (6th Cir. 1989), in which it had determined that the grassy strip on which petitioners were apprehended "was within the boundary * * * of the base." Pet. App. 8. The court stated that "[t]he mere fact that an easement had been granted to the state for the construction, maintenance and use of [a highway] did not give the protestors the right, in bold defiance of military authority, to enter the base, after being previously barred." *Ibid.* The court noted that a "different question would be presented" if petitioners' only intrusion into the base was driving an automobile on the highway, since that would involve the use of an easement on military lands "for the limited public purpose[] for which [it] ha[d] been set aside." *Ibid.* (quoting *United States* v. *Albertini*, 472 U.S. 675, 698-699 (1985) (Stevens, J., dissenting)).[2]

ARGUMENT

Petitioners renew their contention that they did not unlawfully enter Wurtsmith Air Force Base, because the base commander lacked authority to bar them from an area that is part of a highway easement granted by the federal government to the State of Michigan.

1. As the court of appeals noted, the grassy area adjacent to the highway had previously been held to be within the boundaries of the Wurtsmith Air Force Base. See *United States* v. *McCoy*, 866 F.2d at 829 (diagram showing boundary line of base as including grassy area adjacent to highway); *id.* at 831 (stating

[2] Judge Ryan dissented, concluding that the grassy strip where [petitioners] were arrested is a public way and not part of the air base within the meaning of the bar letter." Pet. App. 18.

that area west of boundary line, which includes the grassy strip at issue here, is part of the Wurtsmith base). The court in *McCoy* acknowledged that the federal government had granted an easement to the State of Michigan for the construction of a highway through the base, but found that the area of the easement was still "part of [the] military installation." *Id.* at 830.

An easement is the right in the owner of one parcel of land to use the land of another for a special purpose. See 2 G.W. Thompson, *Thompson on Real Property* § 315, at 2 (1980). Here, as the court of appeals observed, Pet. App. 8, the federal government granted the easement to the State of Michigan specifically "for the construction, maintenance and use of [the] highway." See 2 G.W. Thompson, *supra*, § 386, at 532 ("One granting an easement may limit the grant, and the grantee takes it subject to the restrictions imposed and cannot enlarge or abuse his privilege."). Although there was evidence that other public uses of the property covered by the easement were sometimes tolerated, the district court explicitly found, Pet. App. 23, that the base commander had not abandoned the right to control the area at issue.

This is not to say that the base commander could properly have interfered with the use of the land as a highway, the "limited public purpose for which it had been set aside," *McCoy*, 866 F.2d at 831. But that was not what the commander did here. Petitioners did not enter the base for the limited purpose of using the highway for transportation; they were therefore not in a position to claim protection based on the easement granted to the State. Moreover, petitioners were convicted for defiance of "bar letters" issued under 18 U.S.C. 1382, which specifically forbade them from entering the base. Petitioners do not contend

that there was any defect in the bar letters, nor did the base commander lack authority to issue them. The granting of a limited easement does not negate the military commander's authority to punish reentry in defiance of his orders under Section 1382, nor does it contract the boundaries of the base for purposes of applying that Section. Since the grassy area adjacent to the highway was part of the base, the government could prosecute petitioners for reentry based on their presence in that area.

2. This Court's decision in *Flower* v. *United States*, 407 U.S. 197 (1972) (per curiam), does not help petitioners. In that case, the defendant was convicted of violating Section 1382 by "quietly distributing leaflets on New Braunfels Avenue at a point within the limits of Fort Sam Houston" in San Antonio, Texas. 407 U.S. at 197. No sentry was posted anywhere along the street, which was open at all times to the public for a variety of activities. *Id.* at 198. In summarily reversing the conviction, the Court determined that "New Braunfels Avenue was a public thoroughfare no different than other streets in the city, and that the military had abandoned not only the right to exclude civilian traffic from the avenue, but also any right to exclude leafleteers." *United States* v. *Albertini*, 472 U.S. 675, 685 (1985).

In *Flower* the military had completely abandoned control of the area in question to both vehicular and pedestrian traffic. This case is significantly different, because the military retained control over the grassy strip subject only to an easement granted to the State to build and maintain a highway. Although the military had occasionally tolerated other uses of the grassy strip abutting the highway, it had consistently asserted its authority over the area. On the day in question, its assertion of authority was clearly

indicated by the presence of the snow fence, the posted signs, and the oral warnings delivered directly to petitioners. Under these circumstances, the district court correctly determined that the military had not abandoned its control over the disputed area, as it had in *Flower*.

3. Nor is there any conflict between the decision below and the lower court cases on which petitioners rely. In *United States* v. *Vasarajs*, 908 F.2d 443 (9th Cir. 1990), the defendant, who had previously been barred from a military reservation, was convicted of violating Section 1382 by driving her car on the road between the end of a highway exit ramp and the main gate of the reservation. The court of appeals upheld the conviction, finding that the area in question was part of the reservation and that the government had not relinquished control over the area. The court observed that the defendant had not made the argument that, as a member of the public at large, she "benefit[ed] from a properly created easement" on the area at issue, 908 F.2d at 446; the court reserved the question whether the existence of an easement would require a different result. Thus the *Vasarajs* decision does not support petitioners' claim that, after granting an easement for the use of military property as a highway, the government could not restrict the use of that property to activities related to the purpose of the easement.

In *United States* v. *Parrilla Bonilla*, 648 F.2d 1373 (1st Cir. 1981), on which petitioners also rely, the defendants were convicted under Section 1382 of unlawfully entering a Navy installation used for amphibious landings. At trial, the government took the position that the installation's true border was the ordinary high tide line of the island where the installation was located. On appeal, the government

conceded that it had failed to prove that the defendants crossed that line, but it argued that the entire beach was part of the installation. The court of appeals rejected that argument on the ground that it had never been presented in the district court. 648 F.2d at 1385-1386. In this litigation, by contrast, the government has contended from the first that the grassy strip on which petitioners were arrested is part of the Air Force base. Accordingly, *Parrilla Bonilla* is inapposite.[3]

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[3] Petitioners argue (Pet. 23-27) that under Michigan law the base commander was without authority to obstruct the easement by the erection of the temporary snow fence, and that petitioners were therefore "privileged to abate this nuisance because their rights to use the easement for its intended purpose of transportation were paramount to all other uses and because they were able to do so without breaching the peace." Pet. 26. Petitioners, however, were not using the grassy strip for transportation; rather, their purpose was to stage a protest involving approximately 400 people, and they remained on the base property after being advised that they were required to leave. Even if the erection of the snow fence might have been impermissible under Michigan law, it does not follow that petitioners were entitled to reenter the military base, having previously been lawfully barred, for a purpose not covered by the easement. In any event, this issue of state property law does not warrant the Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

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